

FAIR EMPLOYMENT & HOUSING COMMISSION

455 GOLDEN GATE AVENUE, SUITE 10600
SAN FRANCISCO, CA 94102
(415) 557-2325 FACSIMILE (415) 557-0855
www.fehc.ca.gov



MINUTES 478th COMMISSION MEETING

June 16, 2009
Hiram Johnson State Building
455 Golden Gate Avenue, Santa Barbara Room
San Francisco, California

PRESENT:

Vice-Chair Patricia Perez, Commissioners Carol Freeman, Stuart Leviton, and Linda Ng; and Commission staff Ann Noel, Caroline Hunt, Cynthia Jones and Loc Tra; Commission externs Andrew Crawl, Rakhi Lahiri, Sarah Monroy, and Katon Dalton; Department of Fair Employment and Housing (DFEH) Director Phyllis Cheng, Assistant Deputy Director Annmarie Billotti, Chief Counsel Tim Muscat, and Staff Counsel Megan Elsea; Deputy Attorney General Nancy Beninati and Department of Justice Externs Jack Albers and Megan Schuller; and member of the public: Deputy Attorney General Joseph Ragazzo.

OPEN SESSION

Vice-Chair Perez moved, Commissioner Ng seconded, and the Commission unanimously voted to call the meeting to order at 10:00 a.m. [09-15]

REVIEW OF AGENDA

The Commission accepted the Agenda as submitted.

REVIEW OF THE MINUTES

Commissioner Leviton moved, Vice-Chair Perez seconded, and the Commission voted 4:0 to adopt the Minutes and Transactions of the 477th Commission meeting as submitted. [09-16]

ORAL ARGUMENT on RECONSIDERATION by the PARTIES: DFEH v. Michael Hudson (Ford) (10:15 a.m.)

DFEH Staff Counsel Megan Elsea presented oral argument on the DFEH's Petition for Reconsideration of the Commission's decision, *Dept. Fair Empl. & Hous. v. Michael Hudson (Ford)*. Vice-Chair Patti Perez noted for the record that respondent Michael Hudson had waived oral argument.

The Commissioners thanked DFEH Staff Counsel Megan Elsea for her oral argument.

DEPARTMENT'S REPORT (10:40 a.m.)

DFEH Director Phyllis Cheng gave the Department's report. Cheng distributed to the Commission the DFEH's 2008 Annual Report. Cheng reported the following:

- Delivery of Services: DFEH is processing its complaint intakes via telephone rather than in person which allows its staff to be more productive. In addition, DFEH has instituted a case grading system adapted from the EEOC to prosecute the most meritorious cases.
- Enforcement: DFEH has reinstated the DFEH special investigations unit to handle class actions, under the supervision of Chief Counsel Tim Muscat.
- Education and Outreach: DFEH has created "Equal Rights 101" videos and placed them on YouTube.
- Civil Rights Leadership: DFEH continues to partner with other civil rights organizations and other entities to celebrate the 50th anniversary of the FEHA.
- DFEH is working with Professor Gary Blasi at UCLA Law School and the RAND Corporation's Social Justice Program to study DFEH enforcement data from the last 50 years. This information will be shared with the Commission, the Governor, the Legislature and civil rights stakeholders.

The Commission thanked Director Cheng for her remarks, ended Open Session and took a recess at 11:00 a.m. The Commission entered Closed Session at 11:15 a.m.

CLOSED SESSION

Only the Commissioners, Commission staff, and Attorney General's staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

Writs and Appeals

Deputy Attorney General Nancy Beninati reported on the updated status of the following cases.

(1) DFEH v. San Francisco BART (Bartley)

San Francisco BART has now tendered a check to complainant Eddie Bartley for the full amount of the Commission's award. This disability employment discrimination case was litigated by DAG Kathy Mikkelson.

(2) DFEH v. Sasco Electric (Scherl)

Oral argument was heard May 11, 2009, and the Commission can expect a decision within 60 days thereafter. This pregnancy and gender employment discrimination case is being litigated by

DAG Toni Cordero.

(3) DFEH v. Terra Linda Farms (Santillan/Rivas)

On February 13, Terra Linda Farms filed a petition for writ of mandate with the Superior Court but did not procure the official administrative record from the Commission. The Commission filed its responsive pleading on May 7 and filed a record with the court, as Terra Linda Farms had not. A hearing date before the Superior Court has not yet been set. This employment discrimination case is being litigated by DAG Nancy Beninati.

Post Decision

Executive and Legal Affairs Secretary (ELAS) Ann Noel reported that the judgments are being enforced by the Department of Fair Employment and Housing in the following four Commission decisions.

- (1) DFEH v. Capitol Hills AM/PM (Johnson)
- (2) DFEH v. Fulkerson (Hartunian)
- (3) DFEH v. Team One Stop (Reed)
- (4) DFEH v. Jennifer Victoria (Project Sentinel)
- (5) Reconsideration in DFEH v. Michael Hudson (Ford)

Vice-Chair Patti Perez moved, Commissioner Stuart Leviton seconded and the Commission voted 4-0 to affirm its prior decision adopting the proposed decision in this matter. [09-17]

Administrative Adjudication: Pending Decisions, Hearings Completed

- (1) DFEH v. Jeannette Prichard (English)

ELAS Noel reported that the Commission has asked the California Apartment Association to file an amicus brief to address issues raised by the Commission's Notice of Opportunity for Further Argument. CAA's and DFEH's briefs will be ready for the Commission's consideration at the next Commission meeting.

At 12:04 p.m., ALJ Hunt presented the following case.

- (2) DFEH v. Historic 23 Club (Beltz)

Vice-Chair Patti Perez moved, Commissioner Ng seconded, and the Commission voted 4:0 to adopt the proposed decision. [09-18]

At 12:14 p.m., ELAS left the meeting and ALJ Hunt presented the following case.

- (3) DFEH v. Acosta Tacos

Vice-Chair Perez moved, Commissioner Leviton seconded and the Commission unanimously voted 4:0 to adopt the proposed decision. [09-19]

Commissioner Leviton moved, Commissioner Freeman seconded and the Commission voted 4:0 to make the decision precedential on the decision's holding that discrimination against a female employee because she is breastfeeding is sex discrimination under the Fair Employment and Housing Act. [09-20]

At 12:54 p.m. ELAS Ann Noel rejoined the meeting.

(4) Request to Suspend 60 Day Rule for Submission of Proposed Decisions (Cal.Code Regs., tit. 2, § 7433, subd. (b).)

The Commission discussed its adjudicative work load and Commission administrative law judge staffing. Commissioner Leviton moved, Vice-Chair Patti Perez seconded and the Commission voted 4:0 to suspend temporarily its usual 60-day requirement for issuance of proposed decisions. [09-21] The Commission will revisit this issue at each Commission meeting.

(5) *Ault v. Walt Disney Corp.* settlement

Vice-Chair Patti Perez moved, Commissioner Leviton seconded and the Commission voted 3:0 to write a letter urging the federal district court in *Ault v. Walt Disney Corp.*, Case No. 6:07-CV-1785-GAP-KRS, to reject any component of a proposed settlement agreement in this case that purports to limit rights under California law for persons with disabilities when the affected individuals have not had an opportunity to protect fully their rights. [09-22]

Commissioner Carol Freeman abstained from the discussion and vote in this matter.

At 1:15 p.m. the Commission voted to end Closed Session and took a 10-minute recess. [09-23]

OPEN SESSION

REGULATIONS

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and housing. Commissioners are working with staff on each regulatory project.

Pregnancy Regulations: An analyst with the Franchise Tax Board reworked the Commission's estimates of the fiscal impact of the Commission's pregnancy regulations and this new information will be submitted to the Department of Finance for its approval of the Commission's "Fiscal Impact Statement." Once the Department of Finance signs off on this statement, the Commission can begin rulemaking.

Disability Regulations: The Commission's disability regulations subcommittee,

Commissioners Perez and Freeman and ELAS Noel have reviewed the Commission's latest draft of its revised disability regulations. The subcommittee is awaiting expected revisions to be made by the EEOC responsive to the Americans with Disabilities Amendments Act of 2008. The subcommittee would like to conform, wherever possible, its regulations with EEOC's, understanding that there remain differences in the two statutes which will not make this entirely possible.

Housing Regulations: Staff continues to make steady progress on new Commission housing regulations, holding bimonthly meetings with the Commission's Housing Working Group to discuss issues and to review draft language. The next meeting of the subcommittee will be June 20, 2009.

LEGISLATION

There was legislative report.

COMMISSIONERS' REPORTS

There were no Commissioners' reports.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT

ELAS Noel reported on the following items.

2008-09 & 2009-10 Budgets & FEHC Work 2009-10: The Commission absorbed a 5% reduction in its FY 2008-09 budget and also cut its staff by 5% for FY 2009-10.

FEHC Work Plan

The Commission discussed briefly the goal of working on one or more educational conference events per year sponsored by the Commission, when its staffing allows.

Personnel

Executive Assistant Loc Tra will be leaving the Commission to work for the Attorney General's office and this position will be eliminated to comply with the state budget cutbacks. ELAS Noel announced that FEHC ALJ Joseph Ragazzo has left the Commission to take a position with the Attorney General's office and she acknowledged Ragazzo for his work with the Commission. The Commission will fill this position as it has not been affected by state budget cutbacks. ELAS Noel and the Commission acknowledged and thanked Tra and Ragazzo for their service with the Commission.

ELAS Noel directed the Commission to the ELAS Activity Report for the remaining items in her report.

ATTORNEY GENERAL'S REPORT

Deputy Attorney General (DAG) Nancy Beninati reported on the work of the Civil Rights Enforcement Section (CRES) of the Attorney General's (AG) Office.

PUBLIC COMMENTS

There were no public comments.

Commissioner Leviton moved, Vice Chair Patti Perez seconded, and the Commission voted 4:0 to adjourn the meeting. [09-24]

ADJOURNMENT

The Commission adjourned its meeting at 1:30 p.m.

Date: June 16, 2009

PATTI PEREZ

Vice Chair

ANN M. NOEL

Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS
OF THE 478th COMMISSION MEETING
June 16, 2009
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 09-15 Unanimously called the meeting to order.
- 09-16 Adopted the Minutes and Transactions of the 477th Commission meeting.
- 09-17 Voted 4:0 to affirm its prior decision adopting the proposed decision in DFEH v. Michael Hudson (Ford).
- 09-18 Voted 4:0 to adopt the proposed decision in DFEH v. Historic 23 Club (Beltz).
- 09-19 Voted 4:0 to adopt the proposed decision in DFEH v. Acosta Tacos (Chavez).
- 09-20 Voted 4:0 to make its decision in DFEH v. Acosta Tacos (Chavez) precedential, holding that discrimination against a female employee because she is breastfeeding is sex discrimination under the Fair Employment and Housing Act.
- 09-21 Voted 4:0 to suspend the Commission's 60 day rule for submission of proposed decisions (Cal.Code Regs., tit. 2, § 7433, subd. (b)) and to revisit the suspension at each Commission meeting.
- 09-22 Voted 3:0 to write a letter to the federal district court in *Ault v. Walt Disney Corp.* Commissioner Carol Freeman abstained from consideration or voting on this issue.
- 09-23 Voted to end Closed Session.
- 09-24 Voted 4:0 to adjourn the meeting.

Prepared By

Ann M. Noel
Executive and Legal Affairs Secretary